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**SLOVER & LOFTUS LLP**

ATTORNEYS AT LAW

1224 SEVENTEENTH STREET, N. W.

WASHINGTON, D. C. 20036-3003

WILLIAM L. SLOVER  
C. MICHAEL LOFTUS  
JOHN H. LE SEUR  
KELVIN J. DOWD  
ROBERT D. ROSENBERG  
CHRISTOPHER A. MILLS  
FRANK J. PERGOLIZZI  
ANDREW B. KOLESAR III  
PETER A. FROHL  
DANIEL M. JAFFE  
STEPHANIE P. LYONS  
STEPHANIE A. ARCHULETA

OF COUNSEL  
DONALD G. AVERY

TELEPHONE:  
(202) 347-7170

FAX:  
(202) 347-3619

WRITER'S E-MAIL:

May 17, 2011

**VIA E-FILING**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, SW  
Washington, DC 20423-0001

Re: STB Docket No. 35504, *Petition of Union Pacific Railroad  
Company for a Declaratory Order*

Dear Ms. Brown:

Dyno Nobel Inc. ("DNI") respectfully requests that the Board deny the Petition filed by the Union Pacific Railroad Company ("UP") in the above-referenced docket for the reasons set forth herein and for the reasons set forth in the reply of the Fertilizer Institute.

DNI is a leading manufacturer and supplier of industrial explosives and agricultural fertilizers, headquartered in Salt Lake City, Utah. DNI's Cheyenne, Wyoming and St. Helens, Oregon production facilities produce over 700,000 tons of essential fertilizer products utilized by farmers to grow agricultural crops. The primary and essential raw material in the manufacturing process for fertilizer (or for explosives) is anhydrous ammonia. DNI receives inbound anhydrous ammonia from various origins, sometimes on a delivered cost basis, and sometimes F.O.B. origin. DNI relies on the railroads to transport anhydrous ammonia to its plants, including UP, which serves both DNI's Cheyenne and St. Helens plants.

DNI is very concerned about actions in recent years by rail carriers with regard to the movement of anhydrous ammonia to DNI's plants. These actions have

already had a very serious and detrimental impact on DNI. For example, several years ago, UP doubled its anhydrous ammonia rail rates from the Gulf Coast to DNI's Battle Mountain manufacturing facility in Utah. DNI could not get the product at a lower cost from a closer location and there was not a substitute for anhydrous ammonia in the manufacturing process. Ultimately, DNI was forced to shut down its Battle Mountain plant, as the increased rail rates alone made the plant uneconomic.

UP and other railroads have recently been seeking to advance with the STB various regulatory intervention initiatives in an attempt to relieve themselves from their common carrier obligations with respect to the transportation of toxic by inhalation hazardous materials ("TIH"). The Board has thus far denied all such requests,<sup>1</sup> while recognizing that other federal agencies, including the Federal Railroad Administration, the Department of Transportation, and the Transportation Security Administration have been charged by Congress in the first instance with establishing and enforcing the comprehensive safety regulatory framework applicable to the rail transportation of hazardous materials (including TIH) through an extensive set of rules and regulations designed to manage and mitigate the risks posed.

UP describes its petition as a discrete dispute between it and one of its customers. However, the petition has much broader implications. If the Board were to take up this matter, and decide in UP's favor, UP would surely attempt to use the decision as a means of imposing onerous and inappropriate indemnity/liability provisions on all of its TIH customers, and other carriers would likely follow. The Board should refrain from taking any such actions.

As an initial matter, whether a particular indemnity/liability provision is valid or enforceable is a matter to be determined by the courts under appropriate state statutory or common law, and thus the issue of enforceability of the indemnity provisions raised by UP likely lies elsewhere. Second, even assuming, *arguendo*, that the STB has jurisdiction over this matter and the ability to resolve the dispute, the request that UP is seeking could have significant consequences. DNI has no control over the railroads or their private systems, or in choosing the routes, the means, or the people that are used in transporting DNI's products shipped by rail. Railroads have exclusive control over their

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<sup>1</sup> See e.g. *Union Pac. R.R. – Petition for Declaratory Order*, STB Finance Docket No. 35219 (STB served June 11, 2009) at 7 (STB denies UP's request to be relieved from its obligation to quote common carrier rates and provide service for a TIH commodity); *Common Carrier Obligation of R.Rs. – Transp. of Hazardous Materials*, STB Ex Parte No. 677 (Sub-No. 1) (STB served Apr. 15, 2011) at 4 n.8 (STB denies AAR request that the STB issue a policy statement addressing liability-sharing arrangements for the movement of TIH materials).

systems, over the involved railcars moving in railroad service, and over rail system safety compliance matters. Any attempts to shift to customers the responsibility to indemnify and defend against claims arising when a commodity or product is shipped by a railroad and is in a railroad's exclusive care, custody, and control – and where the shipper is not negligent – are unreasonable. Also, obtaining insurance against such liabilities at any cost would be extremely problematic for shippers like DNI.

Additionally, there is no need for the Board to address UP's petition. Traditional indemnity/liability provisions have served railroads and their customers well. Those provisions provide that, in the event of an accident, the involved railroad is responsible for indemnifying a customer against claims where the railroad is negligent, and the involved customer is responsible for indemnifying a railroad against claims where the customer is negligent, with liability in the event of any third party fault, joint negligence, etc. determined under governing negligence/tort law principles. Further, these traditional indemnity/liability provisions have not resulted in any "staggering liability" on rail carriers.<sup>2</sup>

DNI is very concerned that UP's petition is a thinly-veiled effort to attempt to drive anhydrous ammonia off of the railroads, which is clearly against the public interest, public policy, and the statutory framework. This is an issue that is best resolved by the railroads continuing to adhere to federal safety statutes and rules, and continuing to work with their customers to ensure the safe handling and transport of these essential materials.

DNI respectfully requests that the Board deny UP's petition.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Peter A. Pfohl', written over a horizontal line.

Peter A. Pfohl  
An Attorney for  
Dyno Nobel Inc.

cc: Counsel for Union Pacific Railroad Company

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<sup>2</sup> Of course, under governing preemption statutes, Congress has provided that railroads are not liable at common law for accidents involving discharge of TIH or other materials when they are operating in accordance with governing federal safety standards and their own internal safety standards. See 49 U.S.C. § 20106.